

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VINCENT E. KEATES,

No. C 05-3959 CW

Petitioner,

v.

JEANNE S. WOODFORD, California
Department of Corrections,

ORDER GRANTING
RESPONDENT'S
MOTION TO DISMISS
HABEAS CORPUS
PETITION

Respondent.

_____ /

Petitioner Vincent E. Keates filed a petition for writ of habeas corpus on September 29, 2005. Respondent Jeanne S. Woodford moves to dismiss the habeas petition as untimely. Petitioner opposes this motion. The hearing scheduled for December 16, 2005 is vacated and the matter is submitted on the papers. Having considered all of the papers filed by the parties, the Court GRANTS Respondent's motion.

BACKGROUND

On April 15, 1997, Petitioner plead guilty to violations of California Penal Code §§ 288.5, 288 and 289(j). Four months later,

1 the court sentenced Petitioner to a twelve-year State prison term.
2 Petitioner did not appeal his conviction.

3 Seven years later, on August 23, 2004, Petitioner filed a
4 habeas petition in the Alameda Superior Court; the petition was
5 denied. Petitioner filed a habeas petition in the California Court
6 of Appeal; that petition was also denied. Petitioner filed a
7 Petition for Review in the California Supreme Court; the Supreme
8 Court denied that petition on August 17, 2005.

9 On September 29, 2005, Petitioner filed a habeas petition in
10 this Court, challenging the application of California Penal Code
11 § 2933.1 to his sentence. In 1994, the California legislature
12 enacted § 2933.1, which capped "worktime credit" at fifteen
13 percent, as opposed to fifty percent, for certain enumerated
14 felonies, including Penal Code § 288.5. Section 2933.1 applies
15 only to offenses committed on or after the date on which it became
16 effective: September 21, 1994. When Petitioner was sentenced, the
17 trial court gave him fifteen percent credit. There was no
18 discussion, or even mention, however, of § 2933.1 or fifteen
19 percent credit. Petitioner contends that the Information charged
20 him with a violation of Penal Code § 288.5 that occurred between
21 May, 1990 and September, 1995; thus, he could have committed the
22 felony before the date on which § 2933.1 became effective.
23 Petitioner states that he thought that he was receiving fifty
24 percent credit and did not discuss the issue of credits with his
25 counsel. It is not clear when Petitioner realized that he received
26 only fifteen percent credit.

DISCUSSION

When the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) became law on April 24, 1996, it "imposed for the first time a statute of limitations on habeas petitions filed by State prisoners." Miles v. Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999). The AEDPA imposes a one-year period of limitation on all habeas petitions filed by a person in custody pursuant to the judgment of a State court. 28 U.S.C. § 2244(d)(1). The statute provides:

The limitation period shall run from the latest of-

- (A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Here, as noted above, Petitioner was convicted and sentenced on August 15, 1997. He did not appeal. The conviction became final sixty days after Petitioner was sentenced. See California Rules of Court 30.1; Lewis v. Mitchell, 173 F. Supp. 2d 1057, 1060 (C.D. Cal. 2001). Thus, Respondent argues that, absent any

1 tolling, Petitioner had until October 14, 1998 to file a timely
2 federal habeas petition. Petitioner filed his federal habeas
3 petition in September, 2005, almost seven years later. A State
4 habeas petition can toll the statute of limitations. 28 U.S.C.
5 § 2244(d)(2). But Respondent argues that it does not in this
6 situation when the State habeas petitions were filed years after
7 the time to file a timely federal petition had passed. As
8 Respondent notes, State habeas petitions cannot revive the statute
9 of limitations once it has expired. See Ferguson v. Palmateer, 321
10 F.3d 820, 823 (9th Cir. 2003) (holding "that section 2244(d) does
11 not permit the reinitiation of the limitations period that has
12 ended before the state petition was filed").

13 According to Petitioner, however, the statute of limitations
14 did not start running sixty days after he was sentenced. Instead,
15 he argues that, because there has been no administrative or similar
16 adjudication of the credits issue and because there is a continuing
17 unlawful detention, the statute of limitations has not begun. This
18 argument is unpersuasive and directly conflicts with the AEDPA's
19 purpose of furthering the principle of finality. See, e.g., Duncan
20 v. Walker, 533 U.S. 167, 179 (2001). Under Petitioner's
21 interpretation, he would have virtually "an unlimited time in which
22 to file his habeas petition, thus hindering the finality
23 principle." Shelby v. Bartlett, 391 F.3d 1061, 1065 (9th Cir.
24 2004).

25 Petitioner's alternative argument is more persuasive.
26 According to Petitioner, had he received fifty percent credit, he
27 should have been released from State custody on July 21, 2003,
28

1 which triggers the AEDPA's one-year period of limitation, and thus
2 his habeas petition should have been filed on or before July 21,
3 2004. As noted above, the AEDPA provides that its limitation
4 period shall run from the latest of four described circumstances.
5 See 28 U.S.C. § 2244(d)(1). The date when Petitioner allegedly
6 should have been released could constitute "the date on which the
7 factual predicate of the claim or claims presented could have been
8 discovered through the exercise of due diligence," the last of the
9 four circumstances. See 28 U.S.C. § 2244(d)(1)(D); Murphy v.
10 Espinoza, __ F. Supp. 2d __, 2005 WL 3093430 (C.D. Cal. Nov. 7,
11 2005) ("petitioner was, or with the exercise of reasonable
12 diligence, should have been aware of the factual predicate of this
13 claim no later than April 11, 1990, the date he believes his
14 sentence should have expired"). However, Petitioner does not
15 disclose when or how he first learned that he would receive only
16 fifteen percent credit.

17 Even using July 21, 2004 as last day of the limitations
18 period, because Petitioner's first State habeas petition was not
19 filed until August 23, 2004, the statutory tolling provided in
20 § 2244(d)(2) does not assist Petitioner. Instead, Petitioner
21 relies upon equitable tolling. He provides a declaration by his
22 son stating that his son paid an attorney to file a motion relating
23 to the credits issue on May 5, 2004, months before the statute of
24 limitations had run. As Petitioner correctly notes, the Ninth
25 Circuit has "held that the one-year statute of limitations for
26 filing a habeas petition may be equitably tolled if 'extraordinary
27 circumstances beyond a prisoner's control make it impossible to
28

1 file a petition on time,'" and were the cause of the petition being
2 untimely. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003)
3 (quoting Brambles v. Duncan, 330 F.3d 1197, 1201 (9th Cir. 2003),
4 amended in other respects by 342 F.3d 898 (9th Cir. 2003)). In
5 Spitsyn, the Ninth Circuit noted, "Equitable tolling is justified
6 in few cases, though." Id. at 799.

7 Here, Petitioner fails to meet his burden to show that this is
8 one of those few cases where equitable tolling is justified. See
9 id. (the petitioner "bears the burden of showing that this
10 extraordinary exclusion should apply to him"). Ordinary attorney
11 negligence does not justify equitable tolling. Id. at 800. Only
12 where an attorney's misconduct is "sufficiently egregious" can the
13 attorney's action, or inaction, constitute an extraordinary
14 circumstance warranting equitable tolling of AEDPA's statute of
15 limitations. Id.

16 In Spitsyn, the court found such egregious conduct: the
17 attorney was hired nearly a full year in advance of the deadline,
18 and, despite being contacted by the petitioner and the petitioner's
19 mother numerous times, failed to prepare and file a habeas petition
20 and did not return the petitioner's file until three months after
21 the file was requested and a month after the limitations period had
22 passed. Based on the limited information provided by Petitioner,
23 however, it does not appear that the attorney's conduct at issue
24 here "was so deficient as to distinguish it from the merely
25 negligent performance of counsel" in cases where the Ninth Circuit
26 has not found equitable tolling. Id. at 801; see, e.g., Frye v.
27 Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001) (miscalculation of the

1 limitations period by counsel and counsel's negligence in general
2 do not constitute extraordinary circumstances sufficient to warrant
3 equitable tolling). Petitioner's attorney was paid in May, 2004,
4 to prepare and file a habeas petition; the attorney filed that
5 petition in August, 2004. This could be negligence. And
6 Petitioner presents no additional facts to show that the time that
7 elapsed between payment and filing resulted from his attorney's
8 sufficiently egregious behavior.

9 Because Petitioner has not disclosed when or how he first
10 learned that he would receive only fifteen percent credit nor met
11 his burden to show that equitable tolling is warranted in this
12 case, the Court concludes that his September 29, 2005 federal
13 habeas petition is untimely.

14 CONCLUSION

15 For the foregoing reasons, Respondent's Motion to Dismiss
16 Habeas Petition as Untimely (Docket No. 4) is GRANTED.
17 Petitioner's petition is dismissed with leave to amend. Petitioner
18 has two months from the date of this order to file a new petition.
19 That petition, however, must explain when and how he discovered
20 that he would receive only fifteen percent credit and show that
21 extraordinary circumstances beyond Petitioner's control existed,
22 which made it impossible to file the petition on time, and warrant
23 equitable tolling.

24 IT IS SO ORDERED.

25 Dated: 12/13/05



CLAUDIA WILKEN

United States District Judge